

No.

05-450 OCT 5 - 2005

In The **OFFICE OF THE CLERK**
Supreme Court of the United States

GAY ELLEN COON,

Petitioner,

v.

JAMES MOORE COON,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
SOUTH CAROLINA**

**PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX**

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QUESTION PRESENTED

Does the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (1998 and Supp. 2004), limit the subject matter jurisdiction of State courts to 50 percent of disposable retired pay?

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OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is Coon v. Coon, 364 S.C. 563, 614 S.E.2d 616 (2005). (App. 1a) The opinion of the South Carolina Court of Appeals is Coon v. Coon, 356 S.C. 343, 588 S.E.2d 624 (Ct. App. 2003). (App. 9a)

BASIS FOR JURISDICTION

The order denying the rehearing of the case was entered by the South Carolina Supreme Court on July 8, 2005. (App. 24a) This petition for writ of certiorari is filed within ninety days from that date.

The statutory provision which confers jurisdiction on this Court is 28 U.S.C. § 1257(a):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

The statutory provision upon which Petitioner's claim is based is the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408 (1998 and Supp. 2004).

10 U.S.C. § 1408(c) provides in pertinent part:

(c) Authority for court to treat retired pay as property of the member and spouse.

(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(e) provides in pertinent part:

(e) Limitations.

(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

STATEMENT OF THE CASE

The family court in Charleston County, South Carolina awarded the Respondent 100% of Petitioner's military pension for nine years. Thereafter, Petitioner moved pursuant to Rule 60(b), South Carolina Rules of Civil Procedure, to set aside the award. On April 10,

2001, the family court entered an order providing in pertinent part:

The provisions of the Uniformed Services Former Spouse's Protection Act, 10 U.S.C. § 108, limits this Court's jurisdiction as to military retirement pay to a total amount not to exceed 50% of the disposable retired pay. For this reason, any order of the Court which attempts to allocate any sum in excess of the said 50% is void for lack of this Court's jurisdiction.

The South Carolina Court of Appeals reversed the family court in its published decision cited above. On a petition for certiorari, the South Carolina Supreme Court affirmed the Court of Appeals, as modified, in its published decision cited above. The order denying rehearing was entered on July 8, 2005.

LEGAL ARGUMENT

- I. The Uniformed Services Former Spouses' Protection Act limits the subject matter jurisdiction of State courts to 50 percent of disposable retired pay.

Absent an express grant of authority from Congress, all military retirement benefits are beyond the jurisdiction of the State courts pursuant to the Supremacy Clause, U.S. Const. Art. VI, cl. 2. McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728 (1981). In McCarty, this Court noted several important

governmental objectives Congress had in enacting the military retirement system and determined that the application of even limited State community property concepts conflicted with this statutory scheme - - a statutory scheme which Congress alone could change:

Nonetheless, Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. We very recently have re-emphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs.

Id. at 238, 101 S. Ct. at 2741.

In response to McCarty, Congress enacted the USFSPA, which granted State courts jurisdiction to determine whether military retirement benefits should be considered marital property under their State laws. This authority flowed to the State courts from Congress, and not from any construction of State marital property laws: "Because pre-existing federal law, as construed by this Court, completely preempted the application of state community property law to military retirement pay, Congress could overcome the McCarty decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property." Mansell v. Mansell, 490 U.S. 581, 588, 109 S. Ct. 2023, 2028 (1989).

In 1990, Congress amended the USFSPA. Subsection (c) of 10 U.S.C. § 1408 is now entitled, "Authority for [State] court to treat retired pay as property of the member and spouse." (Emphasis added.) It provides: "Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1998). (Emphasis added.) The limitations of section 1408 include the following: "The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) *may not exceed 50 percent of such disposable retired pay.*" 10 U.S.C. § 1408(e)(1). (Emphasis added.)

10 U.S.C. § 1408 has spawned a hodgepodge of wildly differing theories and results by State courts as to how disposable retired pay may be treated under State domestic relations laws and has resulted in radically different treatment of the disposable retired pay of retired military personnel depending on which State court adjudicates their rights. See, e.g., White, "The Uniformed Services Former Spouses' Protection Act: How Military Members are at the Mercy of Unrestrained State Courts," 9 Roger Williams U. L. Rev. 289 (Fall 2003).

The South Carolina Supreme Court in the instant case has gone so far as to declare that it needed no grant of subject matter jurisdiction from Congress *at all* and that, in fact, "The USFSPA neither confers

subject-matter jurisdiction on any court nor takes jurisdiction from any court." Coon v. Coon, 364 S.C. 563, 567, 614 S.E.2d 616, 618 (2005). The South Carolina Supreme Court noted: "We respectfully disagree with the Supreme Court of Alaska, which recently held that the fifty-percent limitation is jurisdictional. Cline v. Cline, 90 P. 3d 137, 152-54 (Alaska 2004)." Id. at 568, 614 S.E.2d at 618. In addition to the Alaska Supreme Court, the Court of Appeals of Minnesota has also recently held, in an unpublished opinion, that the USFSPA "ordinarily limits state courts' subject matter jurisdiction over a recipient's 'disposable retired pay,' disallowing court orders that direct the military to disburse more than half of the military pension income to an divorced spouse." Overby v. Overby, 2004 Minn. App. Lexis 1045 (filed September 14, 2004).

CONCLUSION

Because 10 U.S.C. § 1408 has received inconsistent interpretation and application in the State courts, it falls to this Court to resolve the matter. The provisions of 10 U.S.C. § 1408 clearly and unequivocally limit the subject matter jurisdiction of State courts to 50 percent of disposable retired pay, and the decision of the South Carolina Supreme Court should therefore be reversed.

Respectfully submitted,

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